Frank Invaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co. *and* Hotel Employees and Restaurant Employees and Bartenders Union, Local 50, Hotel and Restaurant Employees International Union, AFL–CIO. Cases 32–CA–11599 and 32–CA–11734

October 23, 1991

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 6, 1991, counsel for the General Counsel filed a request for special permission to appeal Administrative Law Judge Jerrold H. Shapiro's ruling denying the General Counsel's petition to revoke subpoenas ad testificandum served upon Field Examiner Nicholas Tsiliacos by the Respondent and the Charging Party. Both parties seek to have Tsiliacos testify regarding alleged communications from the field examiner with representatives of the Respondent and the Charging Party. The Respondent has filed opposition to the General Counsel's appeal.

The relevant facts disclose that on May 22, 1990, the Respondent and the Charging Party began negotiations for a new contract. After a series of meetings between the parties, the Respondent presented its final offer to the Union on October 16, 1990. The offer was rejected by the Union which then instituted strike action against the Respondent. On February 21, 1991, the Regional Director approved a unilateral settlement agreement in Case 32–CA–11599 which concerned the Respondent's alleged withdrawal of recognition. On March 1, 1991, the Charging Party advised the Respondent that it was accepting the Respondent's final offer, so that an agreement had been reached. On March 11, 1991, the Respondent advised the Charging Party that there was no agreement because the offer was no longer on the table.

On May 22, 1991, the Regional Director issued an order withdrawing approval of and setting aside settlement agreement; order consolidating cases; and consolidated complaint and notice of hearing alleging, inter alia, that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by refusing to execute an agreement embodying the terms arrived at during contract negotiations and by refusing to reinstate striking employees.

The principal issues in this proceeding are (1) whether the Union was advised before March 1, 1991, that the Respondent's October 16 offer had been withdrawn and (2) whether, assuming arguendo the Respondent received advice from a Board agent in regard to its procedures for reinstating returning strikers, reliance on such advice would preclude the Regional Director from issuing a complaint on what he concludes are violations of the Act in the Respondent's reinstatement of those strikers.

At the hearing the Respondent and the Charging Party provided conflicting testimony with respect to what was said at the bargaining table as to whether the Respondent's final offer had been withdrawn. The Respondent presented testimony from its labor relations representative, Mike Lynn, that on February 4, 1991, during settlement negotiations on an earlier charge (Case 32–CA–11559),[1] he told Field Examiner Nicholas Tsiliacos that the Respondent's final offer had been withdrawn and that Tsiliacos ''must have'' informed the Union. The Union's witnesses denied that Tsiliacos informed them that Respondent's offer had been withdrawn.

The Respondent does not contend that it requested the field examiner to notify the Union or that the field examiner indicated that he would do so. It appears to be undisputed, however, that the draft settlement agreement in Case 32–CA–11599 originally contained a paragraph stating that the Respondent would advise the Union that its final offer was still on the table but that, on receiving the draft settlement agreement, the Respondent advised Tsiliacos that the draft should be changed since the offer was not on the table. In any event, the unilaterally approved settlement agreement did not contain this paragraph.

Based on such evidence, the Respondent contends that Tsiliacos must have forwarded a first draft settlement to the Union and then explained to it why the disputed paragraph was being deleted. In response to the Respondent's testimony, the General Counsel presented as witnesses the Union's attorney and two other representatives who denied ever seeing the first draft or speaking to Tsiliacos about the final offer. To rebut such evidence, the Respondent seeks to have Tsiliacos corroborate the Respondent's testimony and demonstrate that Tsiliacos relayed such information to the Union.[2]

The Charging Party also sought permission for Tsiliacos to testify in connection with a second allegation in the complaint, i.e., that the Respondent failed and refused to reinstate striking employees after receiving their unconditional offers to return to work. The Respondent defended on the ground that its refusal to reinstate was privileged because the strikers failed to respond to letters offering them reinstatement ''If they submitted new applications and underwent interviews.'' To justify imposition of this condition on rein-

[1] As noted above, this earlier charge was settled unilaterally but the settlement was revoked when a complaint issued in Case 32–CA–11734.

[2] On August 21, 1991, the Respondent's counsel requested the Regional Director to provide a subpoena for Tsiliacos to appear at the hearing scheduled for August 26, 1991. The request for the field examiner to testify was denied by the General Counsel by letter dated August 26, 1991.

statement rights, the Respondent presented testimony that after receiving the draft settlement in Case 32–CA–22599 its labor relations representative telephoned Tsiliacos and inquired whether the phrase ''application for reemployment'' in the notice meant that the Employer could require returning strikers to file new applications and attend preemployment interviews. According to the Respondent, Tsiliacos advised that he would check and get back to the Respondent. Thereafter, Tsiliacos allegedly called the Employer's representative and said that there was no problem with this requirement. On receiving the first letter requesting reinstatement from a striker, the Respondent contends that it again called Tsiliacos and was told that the interview/application requirement was lawful, and that in conducting the subsequent interview/application procedures, it relied on Tsiliacos' interpretation of the settlement. The Union has subpoenaed Tsiliacos to find out what, if anything, he told Respondent.[3]

During the hearing, Administrative Law Judge Jerrold H. Shapiro denied the General Counsel's petition to revoke subpoenas served by the Respondent and the Charging Party on Tsiliacos and directed him to testify. Judge Shapiro found that ''the testimony arose out of such special circumstances and was so clearly relevant and limited in scope, that, in this case, it outweighed the principle of avoiding the appearance of partisanship on the part of Board agents which could result if they testify in ulp hearings.''[4]

In his appeal the General Counsel contends that both subpoenas should be quashed on procedural grounds, that neither the Respondent's nor the Charging Party's requests complied with the requirements of Section 102.118 of the Board's Rules and Regulations which require the General Counsel's written consent for the Board agent to testify, that the Rules further require that the party requesting permission must specify the nature of the proceedings and the purpose to be served by the testimony, and that the one-line requests to the General Counsel made by both parties are not in compliance with the Rules, so that, standing alone, the failure to comply justifies the General Counsel's refusals.

On substantive grounds the General Counsel argues that Section 102.118 was established to preclude Board agents from taking apparent partisan positions, that if an agent testifies, such testimony will almost certainly help one party and harm the other, and that while the Board's Rules and the General Counsel's application thereof are not absolute, no unusual circumstances are present here which warrant requiring the Board agent's testimony.

With respect to the Respondent's subpoena, the General Counsel contends that Tsiliacos' testimony is unnecessary in that there is no evidence that Tsiliacos relayed the Respondent's position to the Union, that even assuming Tsiliacos was requested to, and did, convey this information to the Union, it is merely ''interesting information'' which does not help the Respondent's case, and that withdrawal of the offer must be conveyed by the Respondent, itself, so that the judge's ruling denying the petition to revoke should be reversed.

Regarding the Union's subpoena, the General Counsel argues that again there are no compelling circumstances requiring Tsiliacos' testimony, that assuming arguendo that Tsiliacos told the Respondent it could impose an application/interview requirement on returning strikers, such does not privilege the Respondent to impose an unlawful condition because reliance on the advice of a Board agent is not a valid defense to otherwise unlawful conduct.

In opposing the General Counsel's appeal, the Respondent contends, inter alia, that the subpoenas are very narrowly drawn, thereby obviating any concern that the parties are engaged in a ''fishing expedition,'' that the testimony of Field Examiner Tsiliacos is sought with respect to two crucial and highly relevant matters, that the relevance of such evidence is indisputable, that the Respondent's final offer had been withdrawn prior to the Union's attempt to accept it, that such withdrawal was confirmed by the Respondent on several occasions in discussions with the Union, and that the withdrawal of the final offer is further confirmed by the deletion of language in the proposed notice during settlement negotiations of the original charge.

The Respondent also takes issue with the General Counsel's contention that the settlement agreement was breached, that both the Region and the Respondent had the right to waive certain obligations to achieve a settlement, that the Region may impose conditions that provide for less than full statutory compliance for the purpose of avoiding litigation, and, accordingly, that the standard for testing compliance with a unilateral settlement is contractual in nature and subject to traditional contract principles. The Respondent also contends that it should be able to rely on what it was told by the Region, and that the Region cannot insist that the same conduct which complies with Respondent's expectations gained from discussions with the Board agent who proposed the agreement somehow fails to comply with statutory duties owed to the Charging Party.

The General Counsel's appeal focuses on (1) the communication, if any, between Agent Tsiliacos and the Union or its representatives with respect to whether Respondent's October 16, 1990 final offer remained

[3] By letter dated August 27, 1991, the Charging Party's counsel sought permission from the General Counsel for Tsiliacos to testify. By letter dated August 27, 1991, the General Counsel denied the Charging Party's request.

[4] After ordering the Board agent to testify, Judge Shapiro closed the record subject to the Board's action on the instant appeal.

''on the table'' or had been withdrawn, and (2) what, if anything, Agent Tsiliacos told Respondent's representative Lynn about the propriety of requesting an application from and interview of returning strikers under the terms of the unilateral settlement agreement.

Having duly considered this matter, the Board has decided to grant the General Counsel's appeal and, on appeal, the judge's rulings on the subpoenas are reversed, and the petition to quash both the Respondent's and the Charging Party's subpoenas is granted.[5]

As to (1), it is undisputed that both the Respondent and the Charging Party have testified with respect to whether the Respondent's ''final offer'' was withdrawn prior to its acceptance by the Union on March 1, 1991. Viewing this matter in the light most favorable to the Respondent, the Respondent's contentions are limited to a claim that (a) the Board agent ''must have'' conveyed to the Union the fact that the Respondent's final offer was no longer on the table and (b) that the Union was (or should have been) aware of the withdrawal of the offer as a result of the deletion from the notice to employees of a provision to the effect that the final offer was still on the table when a settlement was being discussed in Case 32–CA–11599.

With respect to (a), the Respondent does not claim that it asked Tsiliacos to notify the Union that the offer was withdrawn, and the Union denies that Tsiliacos communicated this information to the Union. In these circumstances, the Respondent is ''fishing'' for testimony from Tsiliacos that he conveyed the information to the Union. In balancing the policy reasons for not involving Board employees as witnesses in Board litigation against the Respondent's mere speculation that the agent might have served as the Respondent's messenger for conveying to the Union its withdrawal of its offer, we find that the balance weighs against requiring the agent to testify. As to (b), the Respondent is free to argue that the different settlement agreements that were discussed warrant drawing an inference that the final offer was no longer on the table, so that, here too, testimony from the Board agent is unnecessary.

In regard to (2), the Employer's alleged reliance on ''advice'' from the Board agent with respect to reinstating strikers, there is even less reason to require the field examiner to testify. The Board is not estopped from proceeding against a respondent because of statements made by a Board agent during the investigation of a charge. See *Dubuque Packing I*, 287 NLRB 499, 542, 589 fn. 59 (1979); *Dubuque Packing II*, 303 NLRB 386 (1991). Accordingly,

IT IS ORDERED that the General Counsel's appeal is granted and the subpoenas are quashed. This matter is remanded to the judge for further appropriate action.

[5] Although the Respondent's and the Charging Party's one-line requests for permission for the Board agent to testify do not fully comply with Sec. 102.118, the Board's ruling, as was the General Counsel's, is based on the merits of the requests.